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Preparation of Medical TestimonyBy **FRANKLIN S. LONGAN***

This article is intended to demonstrate how a medical witness and a lawyer may be taught at a pre-trial oral conference between them to mutually respect the other's viewpoint. I have not intentionally slanted my remarks toward either the plaintiff's or the defendant's side. First of all I shall discuss the preliminaries to the pre-trial oral conference in the physician's office.

I. STEPS ANTECEDENT TO PRE-TRIAL ORAL CONFERENCE WITH MEDICAL WITNESS

Some lawyers do not seem to realize that a large number of medical witnesses are surgeons with temperaments not *too* much unlike those of trial lawyers. Busy physicians and surgeons do not appreciate being called on the telephone by busy attorneys the day before trial. None of them enjoy coming to the courtroom, for at its best, it is not an agreeable place. Inconsiderate lawyers have been responsible for some of this attitude. Therefore, make your first contact as business-like and as courteous as you know how.

A. The Letter

In representing the plaintiff, I have found it good practice to direct a letter to the attending surgeon or physician asking for a report and including *with* the letter the written authority of my client to release the confidential information.

I believe that there are some magic words to be used in making your first inquiry of the physician if there is insurance in the case. I suggest that you begin your letter with the idea that you need a complete medical report before you can settle the claim of your client with the insurance company. Or if perchance you have already filed suit against the offending person without having had a complete written report from the attending surgeon or physician, then I suggest that your approach to the doctor should be that you and the insurance company cannot get together on a settlement (if that is true), and that sometime in the future you may have to impose upon the doctor to testify at the trial of the case, and that you will need a complete report in order to prepare for trial. This line of approach indicates to the physician that his fee will likely be paid, and in addition, that he will be called upon to testify.

Most of us are familiar with the type of report requested: history, examination and findings, diagnosis, treatment and prognosis. If there are any special subjects which I want the physician to cover minutely (for instance, if the patient has told me that the physician could not give him pen-

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icillin because he is allergic to it), then I request that the physician comment on the effects of penicillin if it was used, and the patient's response to the use of that drug and others. If I have some suspicions that the patient has exaggerated his complaints to me, I request the doctor to touch upon the genuineness of the patient's story.

If I represent the defendant, and am directing an inquiry to the plaintiff's doctor, then I want the same type of report that I would require as a plaintiff's attorney, excepting that I ask the reporting physician to copy verbatim his notes on the patient's history, and I request that the prognosis be broken down in some detail and as outlined in my request.

If my physician is called solely as an expert for either plaintiff or defendant, I invariably copy verbatim the allegations of plaintiff's complaint and ask the expert if his examination of the plaintiff will or will not support the allegations. If the deposition of the plaintiff has been taken, I abstract the significant information for the expert to use prior to the time he makes his examination of the patient.

When representing the defendant, you should be aware of the fact that your expert witness has done nothing more for the injured person than to examine him. Very frequently experts are cross-examined effectively by asking them how long it took the doctor to make the examination, and not too frequently the doctor says "maybe 20 minutes or half an hour." Therefore, in every letter I write to my expert I say the following: "I hope that your examination will last at least one hour. I presume that it will last substantially more than that, and I would like to have you, on your office notes, show the time that the patient was under your immediate examination. Opposing counsel may examine you in order to diminish the thoroughness of your examination by developing that the patient was in your office for a very limited period of time."

I think it a wise gesture in fracture or back cases, to tell your doctor in the letter that you wish him to comment upon arthritic changes or signs, and request him to conclude whether the deposits of bone were normal or abnormal for a patient of that particular age.

B. *The Medical Terms*

Before a trial lawyer attempts to discuss with the physician the contents of the report and the physician's probable testimony, he must acquaint himself with the medical terms which the physician used in it. One of the most pitiful sights in the courtroom is the lawyer who has failed to acquaint himself with the medical terms used by the medical witnesses. He must therefore school himself in the definitions which the doctor used in his written report. The language barrier between the two professions is a real and fearful one for lawyers to surmount. Doctors should take note, and be tolerant of our ignorance and our inelegant use of the technical terms which they use daily to express themselves.

The frightful medical terms sometimes come in handy. I am reminded of the story of the patient who at the conclusion of the doctor's examination said to the doctor: "Now doctor, please don't scare me by using any of those big medical terms in telling me what is wrong." The doctor replied: "Well, in ordinary language you are just plain lazy." The patient replied:

"Now doctor, please tell me the medical term for that so that I may go home and tell my family what is wrong with me."

There is no excuse for a trial lawyer not acquainting himself with the definitions of all of the medical terms used by the physician in his written report, and it will help your scholastic efforts if you write down each of the terms and the medical definition of each before you have your pre-trial conference with the medical witness. Show your definitions to him and have him clarify any which are not understandable. The simple medical terms should be part of every trial lawyer's vocabulary. If, after reading the physician's report, you feel that you are inadequately schooled to ask him intelligent questions at your pre-trial conference, then call upon your physician to furnish you with appropriate medical texts. All physicians are glad to render this assistance. Even if the texts are so complex as to leave you in a state of utter confusion, enough of the subject matter will rub off upon you so that you will not appear as a hopeless dunce at your pre-trial conference and in the courtroom. I have yet to find a physician who will not give me an audience and a helping hand once he senses that I have spent hours trying to become anatomically and physiologically minded. The courtroom is not the place to learn the meaning of medical terms. Assess yourself—if you have a feeling of inadequacy, go to work.

C. *Arrangements for the Conference*

When the time comes to arrange for your pre-trial conference, call your physician and try for an appointment at a time and a place where he will not be interrupted by nurses or distracted by other interruptions.

Furthermore, no doctor can be expected to devote a serious, conscientious, time consuming conference with an attorney unless he is paid for it. Pay for it liberally, always, even though you may feel that in our small communities in the west, the friendliness of our people is a factor which will prompt the busiest of surgeons and physicians to graciously afford courteous lawyers that privilege without pay.

After you have cross-examined yourself on your own adequacy, and before you keep your appointment with the physician, assess your physician. Is he the attending physician? Is he to be used solely as an expert? In either case, let him know what the controversial points are in the case, both from the medical and legal point of view. This is particularly true when you represent the defendant in which instance your physician is more often than not asked hypothetical questions.

II. *THE CONFERENCE*

Start out your pre-trial conference by asking your medical witness for a copy of his scholastic background, training and experience. This is very important, and I shall dwell upon it because my experience has shown this to be the seat of some of the troubles which the medical profession experiences in the courtroom.

If your medical witness is not a specialist, or if he has never been in court before, or if he is timid, dive into his qualifications during your pre-trial conference and develop his qualifications or lack of them to the point where you know he needs help, or does not need it, when he gets to the court-

room. All that you need to say is that you have a very difficult case (and what case isn't difficult) and suggest that he call in a specialist. Let *him* call in the specialist, in fact, insist upon it graciously. Your specialist then becomes a consultant and he can testify to subjective complaints.¹ You should caution him that on direct and cross-examination he should answer that he is a consultant and not called merely to testify; otherwise you will have trouble getting in evidence opinion answers. If your attending physician is not eminently qualified to adequately render an opinion on every phase of your law suit, then you subject him to that particular type of cross-examination by adverse counsel which makes the doctor fighting mad, because he thinks he is being abused and his reputation attacked. He goes out of the courtroom and tells all of the other physicians what horrible abuse he got in the courtroom, and you, as the attorney and your profession as such, are held in low esteem by the medical profession for it. Here are some clues to help you avoid that result. Use questions similar to those that I am now going to relate to you in discussing this matter of qualification, training and experience with your doctor at the pre-trial conference.

"Doctor, the doctors on the other side may be specialists. Do you have any hesitancy about any specialist disagreeing with your views?"

"Doctor, as a general practitioner you may be asked if you have had any specialized training or have acquired any theoretical knowledge based upon special study in the medical field of (let us say) nerve injury?"

"And if you haven't had any specialized training, please give me some idea of the experience which you have had in the care and treatment of nerve injury cases?"

"Doctor, tell me when do you, if ever, refer cases to nerve injury specialists?"

"Doctor, are you familiar with the requirements of certification of the specialty board for neuro-surgeons and neurologists?"

"Doctor, do you feel that your experience and your success in the nerve injury field qualifies you to match wits with an attorney who may be coached by a nerve specialist?"

It is your fault if some other lawyer makes a dunce out of your doctor by calling to the jury's attention your doctor's lack of qualifications. Physicians always expect the worse kind of treatment in the courtroom, and a lot of it is attributable to the lack of preparation upon the part of the attorney producing the medical witness, as well as his failure to recognize when he needs a specialist to help the general practitioner. On the other hand, all of us have run up against the physician who will not give us any time, or sufficient time to discuss in detail some of the problems which he will face on cross-examination. Then it is the physician's own fault if he comes into court with the attitude that the whole procedure is an imposition upon his valuable time, and all that is required of him is to read from his notes and get the agony over with as soon as possible, and then get the hell

¹Kraettli v. North Coast Transp. Co., 166 Wash. 186, 6 P.2d 609, 611, 80 A.L.R. 1520 (1932).

²Deposition of Dr. Yeatts in Burd v. McFarland (District Court of Seventh Judicial District of Wyoming, Natrona County, Feb. 1955). See Schumacher v. Murray Hospital, 58 Mont. 447, 457, 193 Pac. 397 (1920).

out of there. Such a medical witness generally gets cross-examined to the point of real agony, as he well deserves.

I hope that I have gotten the point across that a great amount of our misunderstandings can be avoided and our attitudes in general can be improved, if doctors and lawyers will both relax at a pre-trial conference and respect one another and get into the frame of mind of attempting to help each other for the sake of their mutual patient and client, and not for the sake of being *prima donnas*.

A. *Difference Between Compensation and Jury Cases*

Explain to your medical witness the difference between the type of testimony which he may have given in a compensation case, and the type of testimony which he will be called upon to give in a personal injury case. The free and easy style of giving testimony in a compensation case is not permitted in the courtroom, and your physician should know why, if his testimony is to be of any value. Here is the reason why. The elements of pain and suffering, past and future, mental anguish, past and future, and conspicuous afflictions should ordinarily be given as much emphasis at the trial as loss or impairment of function.

So many physicians get the impression that the law assumes that a particular bodily injury calls for a definite amount of compensation, and they may not be properly prepared, as to the importance of pain and suffering, mental and physical.

Because of this prevalent attitude of physicians, I want to illustrate this point a bit more forcefully. In casualty cases, which all lawyers call tort cases, the law requires that we prove four things: duty, breach of that duty, proximate cause and damage.³ However, in compensation cases, we deal with three things. First, we must show the employer-employee relationship; second, that the employee was hurt in the ordinary course of his employment; and third, loss or impairment of earning power, temporary or permanent, or loss of an organ or member.⁴ Physical pain and suffering in the average compensation case is not a factor,⁵ and mental suffering never. For instance, if an employee loses an eye, he is paid a fixed amount of compensation. The elements of cosmetic damage, pain and suffering, humiliation, conspicuous affliction, and mental suffering are not present in such a compensation case. However, most of those elements are extremely important in all tort cases, and since the medical profession, as a general rule, fails to evaluate them, the medical witness must be carefully prepared on their importance. Without such preparation, you may get this kind of an answer on the trial when you ask your medical witness the question: "Doctor, describe for the jury the pain, if any, which the patient suffered from his injuries?" Answer: "Well, the patient had some pain, because I see by the hospital chart that he was given a hypo every five hours, and I see from the hospital chart that he was in some pain for several days after the

³Griffin v. Chicago, Milwaukee & St. Paul Ry., 67 Mont. 386, 392, West Key Number System, *Negligence*, 108(1).

⁴Shaffer v. Midland Empire Packing Co., 127 Mont. 211, 215, 259 P.2d 340 (1953); Wiggins v. Industrial Accident Board, 54 Mont. 335, 342, 107 Pac. 9 (1918); Toelle, *Workmen's Compensation in Montana*, 1 MONT. L. REV. 5; See REV. CODES OF MONT. § 92-709 (1947).

⁵Chrisholm v. Vocational School for Girls, 103 Mont. 503, 512, 64 P.2d 838 (1936).

accident." You cannot blame the physician for that kind of an answer if you fail to prepare him, because physicians are much more interested in alleviating pain than in evaluating it. The pain must be identified as to type, that is, persistent or transitory; and as to origin, whether organic or functional; and as to the effect upon the patient, and so on. All of these matters must be developed by the attorney because *he* is the one who is supposed to know what he wants from the physician before trial, not the physician.

B. *Fees and Demeanor*

In your interview with the physician discuss with him his fee for testifying. I personally feel that his fee should be guaranteed by the attorney calling him. You may save him some embarrassment if you warn him that he must testify to the amount of his fee if cross-examined on the point.⁶ Caution him that if he is asked he should admit that he has talked about the case with the attorneys and discussed it thoroughly. (Let's hope that he did discuss it thoroughly.) Otherwise, the attorneys would not know what questions to inquire about. All of his answers on these points should be given in a fair and straight forward manner and without reluctance.

If you represent plaintiff, differentiate for the benefit of the doctor (1) the testimony which he will give on direct examination pertaining to his fees for services rendered in treating the patient from (2) the testimony which he should give on cross-examination pertaining to his fees for testifying as a witness. The former must be the reasonable value of the services he rendered to the patient,⁷ and are a part of the damages recoverable by the patient in the suit. We denominate such damages as "medical expenses." The latter fees are not recoverable by the patient; they are witness fees paid, or to be paid, for testifying. Your witness should know what charge he has made, or intends to make for testifying, and he must disclose the amount of the charges.⁸

If you represent the defendant, differentiate for your expert the testimony which he may be called upon to give on cross-examination concerning his fees for (1) examination of plaintiff, from his fees for (2) testifying. He has to disclose both.⁹

Very few members of the medical profession realize that the amount of their fees charged for testifying has a definite relation to the weight which may be given to their entire testimony by the jury, and the value of their testimony may be lost if the fees charged are so high as to indicate possible bias or prejudice in favor of the side calling them as a witness.

On the other hand, the amount which a medical witness should charge

⁶See *State v. Sedlacek*, 74 Mont. 201, 213, 239 Pac. 1002 (1925) (holding that circumstances of a witness' connection with a case is a material inquiry on cross-examination). *JONES, EVIDENCE* § 828, n. 8, (3rd Edition, 1924), 90 A.2d 371; *Reed v. Philadelphia Transp. Co.*, 171 Pa. Super. 60, 33 A.L.R.2d 1170 (1952); See West, Key Number System, *Witnesses*, 369, 372(2).

⁷See REV. CODES OF MONT. § 17-607 (1947); *Storm v. City of Butte*, 35 Mont. 385, 398, 89 Pac. 726 (1907); *Ball v. Gussenhoven*, 29 Mont. 321, 335, 74 Pac. 871 (1904); *Carr v. Martin*, 35 Wash. 2d 753, 215 P.2d 411, 414 (1950); See West, Key Number System, *Damages*, 101 208(5), 216(9).

⁸*Reed v. Philadelphia Transp. Co.*, 171 Pa. Super. 60, 90 A.2d 371, 33 A.L.R.2d 1166 (1952).

⁹*Ibid.*

for his services in *treating* the patient is not be limited to what would have been allowed to the doctor in treating a compensation case employee.¹⁰

A careful lawyer will ask his medical witness to show him his itemized bill for medical services rendered to the patient. This will enable the attorney to help the medical witness justify the reasonableness of his charges by discussing the charges made by other physicians in the community for like services. It may be well to point out at this time that the doctor's bill is not conclusive evidence of its reasonableness.¹¹

However, the physician who rendered the services, may, himself, testify as to the value of the services.¹²

Give the usual precautions to him to be courteous to the cross-examiner and answer questions on cross-examination with the same frankness that he used in answering questions on direct examination. By all means, try to make it clear to him that his testimony is being heard for the first time by listeners who are wholly unaccustomed to the language which he uses and the terms which he uses to describe his findings. The entire sense and purpose for having the doctor come and testify in court is useless unless he is patient enough and generous enough to understand that his years of training, experience and study are flashed across the minds of jurors in a matter of minutes, and he is wasting his time and damaging the cause of his own patient unless he is interested in making some sense to the jury. And every medical witness is at a disadvantage at the trial if the lawyer questioning him is inapt, unprepared, indifferent, discourteous, or ignorant of how to go about putting the questions to him.

C. DATA AND RECORDS

At your conference, review with him all of his X-rays, photographs, medical reports, hospital records, clinical records and laboratory charts and get him to show you all that he has put down in his own handwriting and all other records made in his own office. If you fail in this, then you may be surprised at trial when he reads from his records some finding of an old injury or previous disease which may have no relation to the patient's present injuries, but which may prove embarrassing nevertheless.

Let your physician know that you intend to give him a subpoena so that he will bring to the courtroom all of his records, charts, bills and so on. Attorneys should make a list of all of the things which will be included in the subpoena at the time of holding their pre-trial conference with the doctor, and in addition, the physician should be told what data, records, models, etc. he should bring to the courtroom.

D. LAYING A FOUNDATION FOR ILLUSTRATIVE EXHIBITS

If your medical expert comes into the courtroom with models, casts, skeletons, charts, and the like, to clarify the extent or nature of the injury, and in asking him foundation questions, you, or the cross-examiner,¹³ ask,

¹⁰Fulton v. Choteau County Farmers' Co., 98 Mont. 48, 72, 37 P.2d 1025 (1934).

¹¹Brown v. City of Blaine, 41 Wash. 287, 83 Pac. 310 (1905). (Overruled by later Washington cases on other grounds).

¹²SCHWARTZ, TRIAL OF AUTOMOBILE ACCIDENT CASES, § 167.

¹³The cross examining attorney may, before evidence is offered, obtain permission from the Court to ask the witness foundation questions.

"Well, doctor, can you adequately explain the patient's injuries without the use of (let us say) these eye charts which are marked for identification as Exhibits A and B?" and if the doctor on the witness stand actually believes that he possesses such rare ability, he may blurt out the shocking affirmative that he can adequately explain the injuries without the exhibits. Then you may be lost, and if not lost, quite embarrassed, all because you failed to explain to the doctor at the pre-trial conference, that you will inquire of him on the witness stand the necessity of using the exhibits to better demonstrate his testimony."¹⁴

E. OPINION QUESTIONS AND ANSWERS

Some explanation should certainly be given to an inexperienced medical witness concerning the legal method used to elicit his direct examination opinion answers. Let us take up the plaintiff's doctor first.

If the witness is the attending physician of the plaintiff, then a careful explanation to him of the problem facing you to channel your questions along well defined evidentiary lines will be of great value to him, and probably of some value to yourself, because it is at the opinion stage of his testimony that you must keep rigid control over your questions and his answers; otherwise the rules of competency will slap you down.¹⁵

Basis of the Opinion

He should be told that he cannot give his opinion first and then recite the facts upon which it is based. So the first rule is—the facts come first, and the opinion second.¹⁶ In other words, the premise precedes the conclusion.

As you know, when the witness is the attending physician of the plaintiff, then everything concerning the plaintiff's history, injuries and disability, is within his personal knowledge, and he should testify to all of the facts which form the basis of his opinion.¹⁷ In that manner *he* supplies the facts which form the premise, not the attorney; and this is the fundamental difference between opinions based upon facts supplied by the medical witness himself, and opinions based upon facts supplied by the lawyer in a hypothetical question.

Your attending physician may base his opinion on (1) the patient's description of his condition and symptoms, and (2) the physical examination.¹⁸

Even if your doctor is not the attending physician, but nevertheless did examine the plaintiff, he may still give his opinion based upon a premise

¹⁴SCHWEITZER, TRIAL MANUAL FOR NEGLIGENCE ACTIONS, 385, n. 1 (1st ed. 1933). Appellee's Brief on Appeal in the Appellate Court of Illinois, Fourth District, in *Smith v. The Ohio Oil Co.*, (where the court asked the witness preliminary foundation questions to allow the witness to use a plastic model of the pelvic region to explain his X-ray readings).

¹⁵REV. CODES OF MONT. § 93-401-27 (9) (1947).

¹⁶*U. S. v. Sampson*, 79 F.2d 131 (9th Cir. 1935) (as to whether plaintiff can follow a gainful occupation); *Irion v. Hyde*, 110 Mont. 570, 578, 105 P.2d 666 (1940) (expert engineer); *DeVore v. Mutual Life Ins. Co.*, 103 Mont. 599, 614, 64 P.2d 1071 (1937).

¹⁷*Lippold v. Kidd*, 128 Or. 160, 269 Pac. 210, 212 (1928).

¹⁸*Kelley v. John R. Daily Co.*, 56 Mont. 63, 78, 181 Pac. 326 (1919).

which he became familiar with through physical examination, and the question which elicits from him that conclusion need not be a hypothetical one.¹⁹ The medical examination supplies the premise for the conclusion.²⁰ Therefore, use the ordinary type of question, *i.e.*, do not put any facts in it.²¹ Merely ask the doctor for his opinion. Naturally, if the medical examination alone does not include all of the facts necessary to form a predicate, (for instance, if patient's subjective history is needed, or if the facts are in dispute,²²) the opinion question may be incompetent, and a hypothetical question must be used.²³ But generally speaking, plaintiff's medical witnesses testify before there is any conflict in the evidence,²⁴ and this advantage may save plaintiff's lawyer the trouble of framing a hypothetical question.

He can state whether the patient suffered *pain*, based upon subjective as well as objective symptoms. This is because he was called professionally to treat the patient, and not for the purpose of testifying as an expert.²⁵ This is not so for the hypothetical witness as to subjective complaints.²⁶

Your attending physician will be happy to learn that he does not have to be present in the courtroom throughout the course of the trial in order to be qualified to testify to his opinion.²⁷

He may be happy likewise to learn that he may explain his testimony by using the plaintiff as an exhibit, and perform experiments upon him such as pricking him with a needle to show lack of sensory reaction.²⁸

He may base his opinion upon *facts* detailed by other witnesses.²⁹

Pin Down His Opinion to the Facts

The second rule is that you must inform your physician that he has to confine his opinion to his *particular* patient.³⁰

That is, you should not allow your physician to testify that "in cases of this kind" a *particular* result will follow from the type of injuries which the plaintiff sustained. Then you are getting into the physician's *general* knowledge rather than into the *particular* results manifested in the *particular* case on trial.³¹

Therefore, be sure that you keep your physician in line and see that he

¹⁹Lippold v. Kidd, 126 Or. 160, 269 Pac. 210, 212 (1928) (hypothetical questions should have been asked); Northwest States Utilities Co. v. Broulette, 51 Wyo. 132, 65 P.2d 223, 233 (1937).

²⁰Lippold v. Kidd, *supra* note 19.

²¹*Ibid.*

²²Langenfelder v. Thompson, 179 Md. 502, 20 A.2d 491 (1941) (attending physician),

²³Lippold v. Kidd, 126 Or. 160, 269 Pac. 210, 212 (1928).

²⁴Copenhaver v. Northern Pac. Ry., 42 Mont. 453, 465, 113 Pac. 467 (1911).

²⁵Kansas City Southern Railway v. Clinton, 224 Fed. 896 (8th Cir. 1915); Kraettli v. North Coast Transp. Co., 166 Wash. 186, 6 P.2d 609, 610, 80 A.L.R. 1520 (1932).

²⁶Union Pac. Ry. v. McMican, 194 Fed. 393 (8th Cir. 1912). But see Kraettli v. North Coast Transp. Co., *supra*, note 25.

²⁷Langenfelder v. Thompson, 179 Md. 502, 20 A.2d 491 (1941).

²⁸Stephens v. Elliott, 36 Mont. 92, 102, 103, 92 Pac. 45 (1907). (attending physician exhibited injured member, hypothetical witness demonstrated with hypodermic needle injection).

²⁹In Re Sales' Estate, 108 Mont. 202, 207, 89 P.2d 1043 (1939) (opinion of physician based upon facts testified to by nurses); State v. Peel, 23 Mont. 358, 364, 59 Pac. 169 (1899) (hypothetical witness).

³⁰Crock v. Magnolia Milling Co., 147 Wash. 589, 266 Pac. 727 (1928).

³¹*Ibid.*

confines his opinion to the particular case. This rule applies to future consequences of an injury as well as to present consequences.²²

However, if your physician wants to use statistics, or his own experience, to sustain his opinion, then you may inquire if a particular result did follow from a particular premise in a relative number of like cases when compared with a given number.²³

Choice of Words in Framing Causation Questions

What magic words must be used in framing causation questions, and what nicety in phraseology must the doctor use in answering them? Must you use the words "reasonable probability," "reasonable certainty," "reasonably likely," or whether the particular premise "did" or "might," produce a particular physical condition? This resolves into how certain does the lawyer have to be in asking, and how exact does the medical witness have to be in giving, his opinion?

The following rules do not apply universally, but the important rule for lawyers and doctor witnesses to keep in mind is, that all words in the probability field generally should mean the same to doctors—such as "may," "might," "could have been," "reasonable certainty," "moral certainty," "reasonable probability," "reasonably likely," "can," and the like. They do not have separate definitions. If the doctor testifies that they do on cross-examination, then he will be asked to define each one separately. Most of us try to believe that there is a distinction between "probable" and "possible" and I try to keep my physician away from the theoretical approach, which is the possibility field. If a doctor cannot get himself out of the field of pure conjecture, then, in my opinion, he fails to be an expert—the jury may speculate on possibilities as easily without his opinion as with it. However, any testimony short of an actual admission that the doctor does not know what caused the effect is worthy medical testimony.²⁴

Where Facts Are in Dispute

Where causation is in dispute, then the medical witness may be asked, "What in his opinion 'might or could have' produced plaintiff's physical condition?" And the medical witness may answer "Plaintiff's physical condition 'might or could have been' produced by trauma."²⁵ If the facts are in dispute, he may not testify as an opinion witness or as a hypothetical witness that an accident or a certain type of trauma *actually* caused, or "did" cause, the physical condition.²⁶ That is, he should not use the verb "do" in any of its tenses.

²²*Ibid.*

²³*Ibid.*

²⁴*Moffett v. Bozeman Canning Co.*, 95 Mont. 347, 356, 26 P.2d 973 (1933).

²⁵See *Kornec v. Mike Horse Mining & Milling Co.*, 120 Mont. 1, 18, 180 P.2d 252 (1947), where the medical witness was asked if the assault "might" have been a contributing factor to the plaintiff's condition. *State v. Ratkovich*, 111 Mont. 19, 27, 105 P.2d 679 (1940) (matter in dispute was type of trauma, blow from blunt instrument or fall—it is not clear from case whether opinion was based on examination of fracture or hypothetical); *Rev. Codes of Mont.*, §§ 93-301-4, 93-301-13 (1947). See also *State v. Shannon*, 95 Mont. 280, 286, 26 P.2d 360 (1933), where counterfeit expert was asked if the exhibits "might or could be" used in counterfeiting.

²⁶*State v. Ratkovich*, 111 Mont. 19, 27, 105 P.2d 679 (1940).

Where Facts Are Not in Dispute

If there is no dispute as to what actually caused the patient's physical condition (for instance a car accident) then medical testimony in any form as to the accident being the cause of the injuries is merely cumulative and generally inadmissible as invading the province of the jury. It is the practice, however, to ask the medical witness if the accident actually caused, or "did" cause, plaintiff's physical condition. The opinion or hypothetical question may be used depending upon the need for the one or the other.

Choice of Words in Framing Damage Questions, Present and Future

Where the issue in the case is not to select a particular cause, but is merely one of securing an opinion as to the extent of the damage done to the injured patient, then it is the better practice to frame questions to the medical witness which use the words "reasonably certain" or "reasonable probability." For example, a medical witness may be asked if it is reasonably certain that the plaintiff would require future care and attention.³⁷ And it is a proper question to ask the medical witness whether or not it is reasonably probable that the plaintiff will sustain pain and suffering in the future.³⁸

Reasons to Support Opinion

This discussion brings us to the last part concerning an opinion witness, namely the reasons which support his conclusions. These reasons do not have to be elicited on direct examination, but I think it is the better practice to do so because it protects your medical witness from a surprise cross-examination on the doctor's definition of "reasonable probability" and other terms which may be tricky. Consequently, I believe your medical witness should be asked at the conference why he thinks a particular effect might be, or could be produced by a particular cause, and make it plain to him that you will ask him for his reasons on direct examination.

If your medical witness is asked on cross-examination to give the reasons which support his opinion, he should do so.³⁹ If he has no reasons his answers will be stricken.⁴⁰ However, the general rule is, that whatever his reasons are, they are then in the case for what they are worth.⁴¹ It is up to the lawyer producing the witness to make them worth listening to and the pre-trial conference is the place to get that done.

Your medical witness cannot reason from effect to cause. For instance a doctor once testified in Court that a nystagmus condition might be caused

³⁷Cornell v. Great Northern Ry., 57 Mont. 177, 192, 187 Pac. 902 (1920). (where the court held that the plaintiff should have introduced evidence tending to show that it would be reasonably certain that the plaintiff would require care and attention).

³⁸Hamilton v. Great Falls Street Railway Co., 17 Mont. 334, 343 P.2d 713 (1895) (where the court's instruction advised the jury that the plaintiff could recover for all pain and suffering which she had sustained, or in any reasonable probability will hereafter sustain, in consequence of the injury).

³⁹See State v. Penna, 35 Mont. 535, 542, 90 Pac. 787 (1907) (lay witness).

⁴⁰Moffett v. Bozeman Canning Co., 95 Mont. 347, 352, 26 P.2d 973, (1933) (hypothetical witness, compensation case).

⁴¹Weakley v. Cook, 126 Mont. 332, 336, 249 P.2d 926 (1952) (hypothetical witnesses); Kelley v. John R. Daily Co., 56 Mont. 63, 80, 181 Pac. 326 (1919).

by encephalitis lethargia, in turn set up by influenza infection.⁴⁸ His answer was stricken.

The weight to be given the grounds assigned by the physician to support his opinion is for the jury.⁴⁹ This brings us to a discussion of how to help the medical witness who is not the attending physician and is more frequently the defendant's physician. The hypothetical question may be used to elicit the testimony of a physician who has examined the patient for the purpose of testifying, and it is the only manner of getting testimony admitted where the physician has never treated or examined the patient.

F. HYPOTHETICAL QUESTIONS

Initially, a general observation should be made which the courts consistently recognize. It is, that any expert witness who has attended the plaintiff for injuries sustained in an accident has far more information than the most comprehensive hypothetical question that could be presented to him.⁵⁰

However, when you are confronted with getting in your evidence by the hypothetical question, prepare it in writing so that your physician will know exactly all of the facts which he will be asked about and upon which he will predicate his opinion.

If your hypothetical question is properly prepared, it gives you an opportunity to argue your case to the jury before that time comes.⁵¹

Your hypothetical witness is not allowed to draw inferences or conclusions of fact from the evidence. Therefore, he must stick to the facts of the case as presented to him in the question.⁵²

The situation is quite different on cross-examination—he may be cross-examined on an assumed set of facts, or on single facts, and isolated from the hypothetical question; and he can be examined as to his opinion on each.⁵³

The hypothetical question may include an episode which occurred in the courtroom.⁵⁴

Generally, the hypothetical question may not include subjective symptoms of the plaintiff.⁵⁵

He does not have to see the wounds.⁵⁶

The same magic words which are used in eliciting opinion evidence are also used in eliciting hypothetical answers.

The defense medical witness must recognize that by the time he gets on the witness stand the facts are in dispute, and even though he has

⁴⁸*Moffett v. Bozeman Canning Co.*, 95 Mont. 347, 355, 26 P.2d 973 (1933).

⁴⁹*Langenfelder v. Thompson*, 179 Md. 502, 20 A.2d 491 (1941).

⁵⁰*Ibid.*

⁵¹*Annot.*, 38 A.L.R. 2d 13, 21 (1952); see 7 WIGMORE, EVIDENCE, § 1918 (3rd ed. 1940).

⁵²*Lehman v. Knott*, 100 Or. 59, 196 Pac. 476 (1921).

⁵³58 AM. JUR., *Witnesses*, § 844 (1948).

⁵⁴*Kraettli v. North Coast Transp. Co.*, 166 Wash. 186, 6 P.2d 609, 611, 80 A.L.R. 1520 (1932).

⁵⁵*Ibid.*; *Northwest Utilities Co. v. Brouillette*, 51 Wyo. 132, 65 P.2d 223, 233 (1937). But see *Kelley v. John R. Daily Co.*, 56 Mont. 63, 181 Pac. 326 (1919).

⁵⁶*State v. Ratkovich*, 111 Mont. 19, 27, 105 P.2d 679 (1940).

examined the plaintiff, and is qualified to express an opinion, his counsel may limit his answers to hypothetical questions.

It is a cardinal rule among all trial counsel that when the attorney is in doubt whether to ask his witness an opinion question or hypothetical question, the latter is used.⁵¹

Your medical witness may be asked to express his opinion, and in addition, he may be asked to answer a hypothetical question.⁵²

If your doctor is familiar with the opinions of the other experts, be sure and caution him that he cannot base his opinion upon theirs. He must use his own critical perception and his particular application of medical facts and rules to the facts of the case before him. In other words, he cannot base his opinion upon the diagnosis of any other physician.⁵³

G. CROSS EXAMINATION OF THE EXPERT

It is not within the scope of this article to differentiate between the approach the lawyer should take in cross-examining the opinion witness from that of the hypothetical witness. Generally, you should point out to your medical witness at the conference the following probable approach which the cross-examiner will take to test the soundness of his opinion.

1. The probing by the cross-examiner for facts showing bias, prejudice and interest in the outcome of the suit.

2. The basis, extent and other matters concerning the medical witnesses' knowledge of causes of patient's physical condition.

3. The scientific basis, or lack of it, for any medical facts or rules which he used in making any medical deduction from the facts upon which he based his opinion.

4. The particular application of such medical facts and rules to the facts of the particular case.

5. The existence of facts concerning the patient's injuries, illness, and condition which he would testify to and which formed part of the predicate for his opinion.

6. His experience and ability to apply the medical facts and rules to the instant case.

7. Whether or not an examination of the X-rays of the patient would be necessary or helpful in giving an opinion.

8. Whether he considered other causes as bringing about the plaintiff's physical condition, and why he eliminated them.

9. Whether other causes were factors which could render his opinion as to the plaintiff's physical condition untrustworthy.⁵⁴

If you cover the disputed territory with your medical witnesses in the fashion which I have here illustrated, you will find him fairly capable of handling himself on cross-examination.

⁵¹Lippold v. Kidd, 126 Or. 227, 269 Pac. 210 (1928); Langenfelder v. Thompson, 179 Md. 502, 20 A.2d 491 (1941); SCHWARTZ, TRIAL OF AUTOMOBILE ACCIDENT CASES, § 159.

⁵²Kraettli v. North Coast Transp. Co., 166 Wash. 186, 6 P.2d 609, 611, 80 A.L.R. 1520 (1932).

⁵³Corrigan v. United States, 82 F.2d 106, 107 (9th Cir. 1936).

⁵⁴Mattfeld v. Nester, 226 Minn. 106, 32 N.W.2d 291, 3 A.L.R.2d 909 (1948).

If you can drive or drum into his head the idea that his opinion does not have to be capable of demonstration; that he does not have to speak with confidence excluding all doubt; that it is enough that he state that his opinion is in his judgment true; then he should have confidence in himself to parry off any thrust on cross-examination.⁵⁵

Attorneys should be careful to protect their medical witnesses against cross-examination which is merely argumetative. For instance, the doctor should not be cross-examined on whether he is "guessing"; whether he considers himself as good a judge of the matter in dispute as other experts testifying in the case; whether his testimony is untrue; or whether it is "speculative."⁵⁶

If your doctor can testify that his explanation of the cause of the plaintiff's physical condition is more probable than any other explanation, and give reasons to support it, then you have satisfied the rule of law proving causation by a preponderance of the evidence.⁵⁷

If you can instruct your physician to use the word "tend" either on direct or cross examination, to tie in his opinion with the facts, you have saved him from groping for words to adequately express his reasons for tieing in his diagnosis with cause.⁵⁸

For example, if the physician testifies that his findings "tend" to prove the cause of death as traumatic, rather than pneumonia, then you have made some headway, not only to prove your point, but also to arm your medical witness with an idea of how to protect himself on cross-examination.⁵⁹ Naturally, he must *believe* that his findings do "tend" to prove what he testifies they do.

Use of Texts in Cross-examination

Direct your physician's attention to the fact that he may be cross-examined by opposing counsel on a text treatment of the subject about which he is testifying. It is proper on cross-examination to ask the physician whether he agrees with a particular statement from a standard work on medicine.⁶⁰

It is not necessary that the medical witness should have referred to any text on his direct examination, in order to allow counsel to cross-examine him by reference to a medical text.⁶¹

However, on direct examination, the lawyer may not read from a text and ask the medical witness if he agrees with the portion read.⁶²

⁵⁵REV. CODES OF MONT., § 93-301-4 (1947); *Mattfeld v. Nester*, 226 Minn. 106, 32 N.W.2d 291, 3 A.L.R. 2d 909 (1949); *Gaffney v. Industrial Accident Board*, Mont., 287 P.2d 256, 261 (1955); *Moffett v. Bozeman Canning Co.*, 95 Mont. 347, 358, 26 P.2d 973 (1933).

⁵⁶*Mattfeld v. Nester*, *supra* note 55.

⁵⁷*O'Leary v. Scullin Steel Co.*, 303 Mo. 363, 280 S.W. 55, Annot., 136 A.L.R. 965, 1002 (1924).

⁵⁸REV. CODES OF MONT., § 93-301-10 (1947); *Moffett v. Bozeman Canning Co.*, 95 Mont. 347, 358, 26 P.2d 973 (1933).

⁵⁹See note 58 *supra*.

⁶⁰*Emerson v. Butte Electric Ry.*, 46 Mont. 454, 459, 129 Pac. 319 (1912); *State v. Penna*, 35 Mont. 535, 543, 90 Pac. 787 (1907).

⁶¹*State v. Bess*, 60 Mont. 558, 570, 199 Pac. 426 (1921).

⁶²*Lewis v. Johnson*, 12 Cal. 2d 558, 86 P.2d 99, 101 (1939); *Schumacher v. Murray Hospital*, 58 Mont. 447, 456, 193 Pac. 397 (1920). (See West, Key Number System, *Evidence* 553(1), 556, 558(11), *Criminal Law*, 487, 489.

It is a good idea to have your doctor at the time of your conference give you a list of the texts which he recognizes as covering the important medical issues in the case.

Furthermore, it seems to me to be indiscreet on the part of your doctor to have him adopt a "know it all" attitude, no matter what the texts say, which puts him in the position that he is the one and only authority on the subject. It takes a very convincing doctor to come out ahead of the cross-examining lawyer when he exhibits a "know it all" attitude. When I find myself with such a doctor, I try to convince him that a text treatment is a theoretical approach and that he can admit that such an approach does exist, but his is the practical approach, and therefore the better of the two.⁶⁸

The Timid Doctor

If he is timid and worried about what the opposing doctor is going to testify to, then bolster him up by telling him that every law suit involving a personal injury had one doctor testifying on one side and another doctor testifying on the other. Medical science is not an exact science, and each of them has a right to express his particular view point. Sometimes, I try to illustrate to a physician who is timid about testifying to the extent of loss of function by saying, "Now doctor, if a surgeon lost the thumb of his right hand (if he was right handed), *he* would have no trouble in testifying that *he* had lost 50% or more of the use of that hand in his profession. Maybe *you* wouldn't agree with him because *you* are a general practitioner. Likewise, doctor, conflicting viewpoints can arise concerning a bricklayer who needs his thumb to lay bricks. The point is, doctor, the law says that you are an expert and without your superior knowledge, the law is helpless to aid the injured party." Or, if you represent the defendant, then, "Doctor, the law is helpless to arrive at a just result."

If you represent the defendant, do not spend any of your valuable time talking to a physician who will not agree to testify for you before he makes an examination of the patient. If he leaves you in the lurch, that is called "where there's a will there's a won't." He will examine, but he won't testify.

Hospital Charts

Your physician should never read from the hospital records the story which the patient gave to it. This is hearsay.⁶⁹

H. TESTIMONY CONCERNING THE PATIENT

This preliminary discussion leads me up to a blow by blow description of what the medical expert should be prepared for in testifying about the patient himself. I am going to use the six topics, history, examination, findings, diagnosis, treatment, and prognosis.

(1) *History*

This phase of the interview with the physician is most important be-

⁶⁸See *Moffett v. Bozeman Canning Co.*, 95 Mont. 347, 358, 26 P.2d 973 (1933).

⁶⁹*Green v. City of Cleveland*, 150 Ohio St. 441, 443, 83 N.E.2d 63, 65 (1948); see REV. CODES OF MONT., § 93-801-2 (1947), for competency rule on admission of records.

cause the history of the case is given from a subjective point of view and attorneys should be observant as to whether or not the subjective symptoms are backed up by the objective findings.

It is generally recognized in the two professions that patients frequently tell their doctors much more than they do their attorneys. There may be important physical details which the patient reveals to his doctor, but which he would not think of disclosing to his attorney. One of the reasons for this is that in the great majority of personal injury cases, the client has never before seen or talked with an attorney. However, in the case of the doctor it is more frequently true that the doctor and patient know each other. I think both doctors and lawyers agree that it is important in treating the patient to know how he feels. Some physicians have tried practicing by radio but their brethren classify it as inaccurate and dangerous!⁶⁶

One of the most important of the subjective symptoms is the patient's story of the *amount* of pain which he presently has. Whether the physician is representing the plaintiff or the defendant, in either case he is forced to believe what the patient tells him concerning the *amount* of pain which he presently suffers. If the doctor does not believe the patient and indicates it in his report, or at the pre-trial conference, then he will have to be cautioned by his attorney that the fiercest type of cross-examination is leveled at physicians who say that they do not believe the patients whom they examine. They may have to admit on cross-examination that laboratories are established and research work is done because patients suffer from causes which the medical profession may still classify as theoretical, but which are real causes to the patient.⁶⁷ Disagreement among doctors does not make the trial "a wild goose chase into the field of chance and conjecture."⁶⁸ Seldom will a physician take the witness stand and swear that a person is not hurt just because the physician did not believe him. Likewise the cross-examining attorney has the right to ask such a medical witness the question whether pain *can* exist even though the doctor found no organic reason for it. A common illustration used in cross-examining such a medical witness is to revert to the fact that gas, adhesions or headaches can cause pain and yet not be detectable.

If your doctor disbelieves your adversary's patient, and insists you testifying that he does, have him use the term "patient's imagination," or any other term that means the same, but is considered a bit more dignified for a professional man to use in court. Do not let him use the words "liar" or "lie."

If the written report from your physician states that he disbelieves your client, then further investigation on your part is needed to confirm or deny the doctor's statement. Certainly you should have the patient re-examined by another member of the medical profession if you are representing the plaintiff, to satisfy yourself that your client has not pulled the wool over your own eyes.

⁶⁶Brinkley v. Hassig, 83 F.2d 351, 352 (10th Cir. 1936).

⁶⁷Mattfeld v. Nester, 226 Minn. 106, 32 N.W.2d 291, 305, 306 (1948) ; Gaffney v. Industrial Accident Board, Mont., 287 P.2d 256, 258 (1955) ; Moffett v. Boze-man Canning Co., 95 Mont. 347, 353, 26 P.2d 973 (1933).

⁶⁸Sharp v. Missouri Pac. Railway, 213 Mo. 517, 531, 111 S.W. 1154, 1157, 1158 (1908).

Physicians may find it interesting to know why trial lawyers put so much emphasis on the patient's history. After all, the pleadings of damages in any complaint against an offending person frequently contain subjective complaints as well as findings. For example, pain, nausea, weakness, headaches, shortness of breath on exertion, fainting, etc. However, these same symptoms may be objective if observable by examination, such as involuntary expressions of pain, weakness shown by pallor or pulse, etc. It is extremely important, therefore, that the physician be made to realize that we are trying to demonstrate in the courtroom that all of the subjective symptoms of the patient can be confirmed and established by objective findings of the medical witness. To the jury, this means that the patient is telling the truth. If you represent the defendant, then it is equally as important for the defendant's doctor to take a complete history of the patient, for pre-existing disease or ill-health may be found and the damages minimized thereby; and also, the examination may indicate that the subjective symptoms of the plaintiff were not confirmed by the objective findings of the examining physician.

Before turning to the subject of examination and findings do not forget to ask your doctor during your pre-trial conference with him if he can testify that he objectively found plaintiff's subjective symptoms to be actual existing symptoms.

(2) *Examination*

Let us now examine the approach which you should have towards your medical expert in developing his method of examination.

Where trauma is the actual cause of the patient's injuries, its extent and severity, the healthy condition of the part injured prior to the injury, and the relationship of pre-existing ill health or disease to the injuries are important for the plaintiff and defendant lawyer to know.

In certain types of personal injuries there is a recognized method of examination. Have your medical witness explain to you at the pre-trial conference the various methods of examination and if the one he used is a generally accepted one.

(3) *Developing the Findings Into Useful Testimony*

Now lawyers, here is the place where you leave the realm of the law and think of blood, bones, bowels and brains.

It isn't possible in this paper to develop in any detail even a small part of the medical information which the doctor should enlighten you about concerning his examination and findings. But there is a logical way to take the findings of the physician and develop them at the pre-trial conference to show the effect of trauma upon the physical structure of the body, and some method, such as the one I am about to describe should be used at your conference.

Let us take for example a bad fracture of the leg. From that finding, try to develop the following points: that if there is torn tissue, then there are torn nerves, torn muscles and torn blood vessels; when nerves are severed that causes pain, and likewise loss of power; when the muscles are torn, that likewise results in loss of function; when ligamentous tissue is torn, that is more damaging than tearing muscle tissue.

If blood vessels are torn, then free blood is considered a foreign body outside of the blood vessels themselves. That likewise causes pain because of built up pressure. Circulatory function is thereby deranged.

Your doctor should brief you carefully on the danger of infection because all of us know that bacteria have access to wounds. The defendant's doctor should help you develop the small chance for infection with modern miracle drug usage.

The healing process starting with inflammation, and carrying on with the development of connecting tissue should be covered. In this connection, find out whether the bone is a fast healing bone or a slow healing one. For example, we know that the tibia and the heel bones are very slow healing bones. We likewise know that connecting tissue has great contracting qualities and that this causes discomfort.

Discuss the question of immobilization of the member, the wasting of muscle tissue, the stiffness of joints and the contraction of the unused member. Discuss the dangers of complications from the particular type of injury involved. Compare scar tissue with ordinary tissue; whether it is normal or abnormal scar tissue.

Go into the question of delayed healing or rapid healing. Discuss the question of proper union or improper union of the bone.

The effect of the injury upon the patient's mental outlook, past and future, and the strength or weakness of the patient, past and future, are both very important. All of us know that after a serious operation the patient is in a state of some exhaustion.

It may be important to emphasize the constitutional physique of the patient under this title, and also under treatment and prognosis.

(4) *Diagnostic Aids*

I am going to skip over the subject of diagnostic aids except for two comments. The only remark which I would like to make now is that laboratory tests and other diagnostic aids, such as encephlograms, mylograms and so on are merely aids. They are not considered as substitutes for good clinical procedure. Therefore, at your pre-trial conference you should discuss with your physician the limitation of these tests and aids and also what his testimony is going to be concerning the importance of the tests in relation to his findings.

From the defense point of view, it is most important to cross-examine the plaintiff's doctor on the point whether he took all of the standard tests, and to develop their importance or non-importance. Therefore, you must know what the tests are.

The defendant's physician is always at a disadvantage because his examination for diagnostic purposes usually comes along after the accident has happened. His contact with the patient seldom exceeds the one visit. What may have been obvious to plaintiff's physician may now be unobservable by the defendant's physician. In some cases the patient has died, and the doctor is left with no more than the hypothetical question as a basis for his medical opinion.

Let us start out by trying to give the physicians some help on this subject of developing their diagnosis at the pre-trial conference in such a

way that they will have confidence in themselves and can withstand cross-examination.

An amusing definition by our courts of the word "diagnosis" is that it is "a little more than a guess enlightened by experience."¹⁰⁰

The value which is to be given to any diagnosis is determined by the jury. They are interested in who is giving the opinion; what has been his training; what has been his experience; and what does he know about the circumstances upon which he bases it.¹⁰¹

Since a diagnosis is really the end result of a search for causes, it is important for attorneys to try to impress upon the doctor that the diagnostic approach should be to search and identify a single cause, to-wit, either trauma, disease, or functional disorder.¹⁰² Some doctors frequently speculate as to other and different causes which might have caused the patient's physical condition or death. A physician fails to be an expert, unless he can identify a single cause, because the jury is just as qualified to speculate that any or all of the issues respecting disability were the cause of it as the doctor is, but it takes an expert, that is a member of the medical profession, to select one of those causes—the principal one—and exclude the others.¹⁰³ This selection does not have to be perfect. It only has to be to a moral certainty, that is, to a conviction in his own mind.¹⁰⁴ The selected theory or diagnosis of causation should "tend" to exclude any other theory.¹⁰⁵ He may still have doubts, but conviction satisfying his conscience is all that is really necessary. Any physician has the right to give his opinion as long as it rests upon a factual predicate or a scientific deduction. Physicians, therefore, need go no further than asserting that trauma is the probable cause, or might or could have been the cause of the patient's disability.¹⁰⁶

If your doctor is timid about putting his thumb upon a definite cause, discuss with him the relationship of proximate cause and remote cause in the field of the law. You can tell him that in our field we are likewise required to find a proximate cause and that we are to exclude the other causes, if we are to recover at all.¹⁰⁷

Sometimes we lay emphasis upon the procedures upon which the doctor's conclusions were based and in other cases we merely stress the diagnosis per se. A case of blindness illustrates the point that diagnosis per se may be all that you care to touch upon.

¹⁰⁰Swan v. Long Island Railway Co., 79 Hun. 612, 29 N.Y. Supp. 337, 338 (Sup. Ct. 1894).

¹⁰¹Mattfeld v. Nester, 226 Minn. 106, 32 N.W.2d 291, 305, 306, 3 A.L.R. 2d 909 (1948).

¹⁰²Moffett v. Bozeman Canning Co., 95 Mont. 347, 358, 359, 26 P.2d 973 (1933). See REV. CODES OF MONT., §§ 93-301-4, 93-301-10, 93-301-13 (1947).

¹⁰³Lippold v. Kidd, 126 Or. 160, 269 Pac. 210, 215 (1928); Moffett v. Bozeman Canning Co., *supra* note 70 at 353.

¹⁰⁴Moffett v. Bozeman Canning Co., *supra*, note 70 at 353. See REV. CODES OF MONT., §§ 93-301-4, 93-301-10, 93-301-13 (1947).

¹⁰⁵Moffett v. Bozeman Canning Co., *supra* at 361 (dissenting opinion).

¹⁰⁶Mattfeld v. Nester, 226 Minn. 106, 32 N.W.2d 291, 305, 306, 3 A.L.R. 2d 909 (1948).

¹⁰⁷Shaw v. New Year Gold Mines Co., 31 Mont. 138, 148, 77 Pac. 515 (1904) (holding use of the word "tend" is not conjectural).

(5) *Treatment*

If you do not know, the physician can tell you whether the treatment given to the patient was conservative or dramatic, and he should use those terms and explain their use to you.

Tell your medical witness to testify that the treatment which he gave to the patient is one of the recognized methods of treatment (if it was).

Some treatments are in themselves painful, and add to the patient's discomfort. An illustration, of course, is deep X-ray.

Sometimes complication arises from the type of treatment given. It is not an infrequent occurrence for patients to be allergic to certain types of drugs. Sometimes the casts on their limbs cause pressure on nerves and resulting pain.

Since everyone is apprehensive and worried about the future, and since patients all go through a difficult period of adjustment, certain medical treatment may be necessary to keep the patient's outlook healthy. Develop this with your physician.

This treatment phase of your interview always gives you a chance to show that certain types of fractures and certain types of injuries require longer treatment or shorter treatment than other types.

Patients take certain types of injuries more seriously than other types. This fact may be one which your physician thinks is desirable to develop in a particular case.

This leads us to the last and final approach in laying the ground work for your physician's testimony.

(6) *Prognosis*

The plaintiff's job is to give an adequate picture of damage to the jury. And the doctor, particularly in cases where there are many multiple minor injuries, may not adequately express the overall effect of all of such injuries upon the patient at the particular time when all of them were present. For instance, and by way of illustration, if I have the hiccups, and an eye lash in my eye, and a pebble in my shoe, and a pimple on my posterior, I am a very uncomfortable person. All of those very minor problems aggregated together can cause me considerable suffering. The plaintiff's physician should, therefore, convey what is in fact a very *true* picture of the patient, and that is, each of the injuries standing alone may not be serious in and of themselves, but combined with all of the other injuries give a very distressing picture of disability.

Of course, the defendant's physician's approach should be to stress each minor injury and show that it does not effect employment; that all disorders can be cured and are not permanent types of disability; and that the doctor would have no reason to believe that the patient would do any worse from the trial date on forward.

I. *STATISTICS*

When you represent the plaintiff and are discussing this matter with your physician, be sure that he understands that he may be cross-examined on statistics in connection with other people having like injuries, and whether his opinion may or may not be against the whole weight of the statistical viewpoint of the profession. He may need reminding that he is trying one specific case and not trying a batch of statistics and that when

he is confronted with the statistical approach, he may respond that his opinions are based upon the particular case on trial. This rule, like all rules of law and medicine has its exceptions.

When I am in a physician's office, I frequently ask him this question. "Doctor, what is the trouble with statistics as proof?" If I like his answer, then I tell him to use it when he is cross-examined on statistics at time of trial. If I am the one putting on the statistics, then I try to show that the statistical viewpoint should have more weight than the isolated opinion of one physician. Your doctor will generally so agree.

Of course, when you represent the defendant, at best you do not have anything to go on except cross-examination of plaintiff's physician, one physical examination of the plaintiff, the hypothetical question and statistics, and if you search hard enough and far enough you will find plenty of statistics to back up your approach. However, the looking should all be done by your own physician.

J. TONING DOWN THE DAMAGES

When you represent the defendant you may want to bring out with your expert that the plaintiff's doctor did a good job under the circumstances.

If you produce the defendant's doctor and are satisfied that the plaintiff is a big strong character and will give such an appearance, then you may wish to emphasize the constitutional physique of the plaintiff. The same holds true for the plaintiff if his client is puny. Physical strength and general health are vital subjects because they are circumstances for the jury to weigh in applying the mortality and annuity tables."

One of the classic examples of scaling down the severity of an injury is to define the word "contusion" as merely a bruise, and the word "laceration" as merely a cut. Unless your physician is willing to help you on these tricky definitions, great damage can be done to your case. All of us doing any defense work, frequently find definitions that change major injuries into minor ones. Likewise, all of us know that contusions of the brain in head injury cases are certainly not ordinary bruises, and it would be detrimental to the plaintiff's case to allow that types of cross-examination to be left unchallenged.

K. MEDICAL VIEWPOINT ON EXTENT OF DAMAGE OR COMPLETENESS OF RECOVERY

In cases where recovery of the patient has been miraculous with little permanent injury, but dreadful injuries to begin with, your medical witness will be exceedingly proud of the wonderful job which he did on the patient. He may, or he may not, properly emphasize the original damage, and when you represent the plaintiff, your medical witness, some how or other, has to appreciate the fact that plaintiff's lawyers do not want to leave the impression of what a wonderful job the surgeon did on the patient, but are interested in giving an adequate picture of the damage done to the patient. However, if you represent the defendant, emphasis is always placed upon recovery, and little or none upon the damage done.

Actually, the choice of emphasis is not made by the attorneys. The law

⁷⁶See *Robinson v. Helena Light & Ry. Co.*, 38 Mont. 222, 248, 249, 99 Pac. 837 (1909).
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makes the choice for them, because the law requires that the injured person prove by a preponderance of the evidence the damage done to him. As I stated earlier in this article, if you represent the plaintiff, the law requires that you prove duty, breach, proximate cause and damage. Mind you, the law isn't that you prove duty, breach, proximate cause and how good a job the surgeon did on the patient. I confess for all of the lawyers that we and the public appreciate the blessings which doctors have bestowed upon injured persons by their expert care, but in a damage action, the law *insists* that the plaintiff prove *damages* by a preponderance of the evidence, and not that the physician or surgeon did a beautiful piece of work by a preponderance of the evidence. Any trial attorney knows that after a surgeon has done a miraculous job of patching up the patient that one of the first questions which may be asked of him at the trial on cross-examination is, whether or not as a result of his skill the patient has made a complete recovery. And being human and being truthful, he may probably say, "Yes." Then, there is not much left for the plaintiff's attorney to do except to bring out on redirect examination that after the surgeon set all of the bones, stopped the infection and allayed the pain, that nature stepped in and did the whole healing job and that it was a rough one for nature to do. You have to take the spotlight away from the surgeon if his job was so easy and give it to nature, and your surgeon will generally testify that nature had quite a struggle even though he did a great piece of work.

I wish to re-emphasize that whether you represent the plaintiff or the defendant, you must use your physician as a mirror to reflect either the nature, character and extent of the injuries, or as a mirror to show complete recovery. So, polish up your mirror!

III. CONCLUSION

I urge both physicians and lawyers to take a sensible view of their own work. We think our own particular job is so important, and cooperation with each other is not too important. Actually, there is a common bond between us. Health and justice are human values. In civil actions, society has developed no other form of justice than money.⁷ That is why a surgeon insures his hands. If he lost them in an accident and his hands were not insured, juries in this day and age would never award him adequate damages. Therefore, we are all in the same play. A physician's act comes first, ours comes second.

I hope that physicians will learn to take the viewpoint that legal care may be as important to their patients as medical care, because their patients are thinking in terms of money more so than of the state of their own health the very minute the physician tells them that they are, or are not going to get well.

We lawyers are anxious to be better lawyers. We also want physicians to be better medical witnesses, but that's the lawyer's job. Both professions can be twin blessings to the public if we make them so. And when the expression is used "Just what the doctor ordered," we are going to consider that to be a good trial lawyer.

⁷See REV. CODES OF MONT., §§ 17-201, 17-202, 17-203 (1947).